SHEIKH ABDUL AZIZ SHEIKH SHUKOR & ORS

v.

SHEIKH MUSTAPHA SHEIKH SHUKOR & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFFIN ZAKARIA JCA
[CIVIL APPEAL NO: N-02-78-1997]
23 SEPTEMBER 2002

CIVIL PROCEDURE: *Adjournment - Application for - Principles - Whether grant of adjournment entirely within discretion of court - Burden on applicant to provide sufficient material upon which discretion may be exercised in his favour*

The appellants/plaintiffs had earlier obtained an *inter partes* injunction in the High Court against the respondents/defendants. Thereafter, the 1st and 2nd defendants took out a summons to have the injunction amended. When the matter came up for hearing before the judge-in-chambers, counsel for the plaintiffs requested an adjournment on the ground that her firm had only just been appointed. The learned judge refused and proceeded with the hearing at the end of which he allowed the defendant's application to amend the injunction. Aggrieved, the plaintiffs appealed against the refusal of the learned judge to grant them an adjournment.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the oral judgment of the court:

[1] Whether an adjournment should or should not be granted is a matter entirely within the discretion of the court to which the application is made. The burden is on the applicant to place before the court sufficient material upon which the discretion may be exercised in his favour. (pp 110 g, 111 a, c-d, f & 112 a)

[2] In the present case, there was insufficient material before the learned judge to enable him to exercise his discretion in favour of the plaintiffs. (p 112 b-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Di Mahkamah Tinggi sebelum ini perayu/plaintif telah memperoleh injunksi *inter partes* terhadap responden/defendan. Berikutnya, defendan pertama dan kedua telah memfailkan saman dengan tujuan untuk meminda injunksi. Apabila saman tersebut diangkat untuk pendengaran di hadapan hakim-dalam-kamar, peguam plaintif telah memohon penangguhan atas alasan bahawa firma guamannya baru sahaja dilantik. Yang arif hakim menolak permohonan plaintif, meneruskan pendengaran dan akhirnya membenarkan permohonan defendan untuk meminda injunksi. Terkilan, plaintif merayu terhadap keengganan yang arif hakim memberikan penangguhan kepada mereka.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman lisan mahkamah:

[1] Sama ada sesuatu penangguhan boleh atau tidak boleh dibenarkan adalah tertakluk sepenuhnya kepada budibicara mahkamah di mana permohonan tersebut dibuat. Beban adalah di atas pemohon untuk mengemukakan kepada mahkamah alasan-alasan yang mencukupi bagi membolehkan mahkamah membuat keputusan yang berpihak kepadanya.

[2] Dalam kes semasa, tidak terdapat di hadapan mahkamah alasan-alasan yang mencukupi bagi membolehkan yang arif hakim melaksanakan budibicaranya dengan berpihak kepada pemohon.

Case(s) referred to:
*Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC **(foll)***
*Maxwell v. Keun & Ors [1928] 1 KB 645 **(foll)***
*Mohanlal Gordhandas Sheth v. Ban Guan & Co [1956] MLJ 13 **(refd)***

For the appellants/plaintiffs - Shamsul Bahrain; M/s Skrine
For the 1st & 2nd respondents/defendants - R Ledchumiah; M/s Ramamoorthy Ledchumiah & Co
For the 3rd respondent - Manian Raju; M/s Gunaretnam & Co

[Appeal from High Court, Seremban; Civil Suit No: 22-20-1996]

Reported by Gan Peng Chiang

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JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

b On 9 April 1996 the appellants before us obtained an injunction from the High Court, Seremban against the respondents. That injunction arose out of suit No: 22-20-1996, based on two agreements, one dated 5 January 1993, and the other, a supplementary agreement dated 19 June 1995. The injunction in question was obtained *inter partes*. Later, on 3 February 1997, the 1st and 2nd respondents
c applied to the High Court Seremban to amend the injunction obtained by the appellants. The summons for amendment was taken out on 2 November 1996. When it came on for hearing on 3 February 1997 in chambers before the learned judge, counsel for the appellants appeared and asked for an adjournment on the ground that her firm had only recently been appointed. The learned judge
d refused the application for adjournment, proceeded with the hearing and gave an order as prayed for in the summons.

On 26 February 1997 the appellants lodged a notice of appeal. The notice of appeal says that it is directed against the "whole of the decision" made by the learned judge on 3 February 1997. However, when the memorandum of appeal
e came to be settled, the appellants directed their complaints against the decision of the learned judge refusing the application for an adjournment of the respondent's summons.

Before us learned counsel for the appellants has argued that the learned judge
f misdirected himself and exercised his discretion erroneously in refusing the application for adjournment. We must confess that we were at first blush impressed with his argument. However, having carefully scrutinised the circumstances presented before the learned judge and as appearing in the record of appeal provided to us, we are satisfied beyond doubt that this appeal is devoid of any merit and must fail.

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Whether an adjournment should or should not be granted in any circumstances is a matter entirely within the discretion of the court to which the application is made. The principles governing an appeal such as this are set out in the judgment of Hashim Yeop A. Sani FJ (as he then was), one of our most learned
h judges, in the case of *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187, where he said:

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The discretion of the Judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v. Piller*. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.

(2) *Prima facie* this discretion is unfettered.

(3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.

(4) Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.

(5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.

Dick v. Piller reviewed a number of authorities on the exercise of the discretion and amongst the cases cited was *Maxwell v. Keun & Ors*. In that case Atkin LJ set out some important guidelines in his judgment appearing at pages 653 and 657 respectively. It is useful to repeat them and they are as follows:

> The court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.

In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion.

Maxwell v. Keun & Ors. [1928] 1 KB 645 was cited with approval in a local Court of Appeal case, *Mohanlal Gordhandas Sheth v. Ban Guan & Co.* [1956] MLJ 13

It is apparent from the foregoing passage – we find it certainly implied – that before a judge or court is asked for the benefit of exercise of discretion, there must be placed before such judge or court adequate material on which the discretion may be exercised. Put another way, the burden is on the person making the application for an adjournment to provide sufficient or adequate material to persuade the court to exercise the discretion in his or her favour.

What material then was placed before the learned judge in the present instance? The record of appeal (in the note taken down by the learned judge at p. 69) merely reflects counsel for the appellants' sole ground, that her firm had just been appointed. When the appointment was made was apparently not disclosed. Neither does the record show the nature of the harm or injury, if any, that the appellants might suffer if the adjournment was refused. Based on the sparse reasons provided to him, we find it hardly surprising that the learned judge decided as he did.

There is another point. It is of some importance. To recall, the learned judge made his order on 3 February 1997. The notice of appeal lodged on 26 February 1997 does not mention the fact that it is directed against his order refusing the adjournment. For that obvious reason, the learned judge merely made passing reference in his written grounds of judgment to his refusal for an adjournment; although he did find the reason advanced to be unreasonable to warrant an adjournment.

Now it is important to remember that on 3 February 1997 the learned judge made two orders. First, the order refusing the adjournment. Second, the order on the summons. If the appellants intended to attack the order refusing the adjournment, they ought, in our judgment, to have specifically directed the notice of appeal against that order. As it happened, the learned judge was obviously misled into thinking that what was being appealed against was his decision on the merits. In fact, he need not in the particular circumstances of this case have addressed that issue at all as is confirmed by the terms of the memorandum of appeal. What this case demonstrates is the importance of the way the notice of appeal is settled so that the judge who makes his decision in the matter is not misled.

Having considered all the circumstances relevant to the present instance, we are satisfied that the discretion was correctly exercised by the learned judge. We therefore find no appealable error. I will now invite my learned brother Abdul Kadir bin Sulaiman JCA to read the order which we propose to make.

Abdul Kadir Sulaiman JCA:

The appeal is hereby dismissed with costs to the respondents. The deposit shall be paid to the respondents towards account of taxed costs.